

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

ALBERT A. GRAY, ADMINISTRATOR,
ET AL.

Plaintiffs,

VS.

JEFFREY DERDERIAN, ET AL.

Defendants.

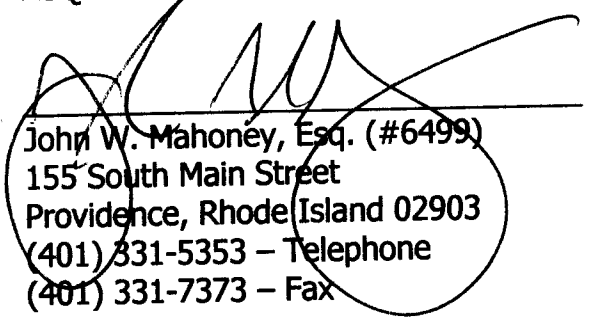
C.A. NO.: 04-312L

**DEFENDANTS MULTI-STATE INSPECTIONS, INC. AND HIGH
CALIBER INSPECTIONS, INC.'S RULE 12(B)(6) MOTION TO DISMISS
PLAINTIFF'S FIRST AMENDED MASTER COMPLAINT**

Now come defendants Multi-State Inspections, Inc. and High Caliber Inspections, Inc. and respectfully moves this Honorable Court to dismiss the Plaintiff's First Amended Master Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a cause of action against defendants Multi-State Inspections, Inc. and High Caliber Inc. as a matter of law. As grounds for the motion, the defendants refer to the Memorandum of Law attached hereto and incorporated herein by reference.

Respectfully Submitted,
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By Its' Attorneys,

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CERTIFICATION

I hereby certify that a true copy of the within document was sent by electronic mailing on the 7th day of January, 2005 to:

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exposed, said amplifiers were in essentially the same condition as when they left the care custody and/or control of JBL.

648. As a direct and proximate result of using and/or being exposed to the dangerous characteristics and properties of said amplifiers, which were sold and/or distributed by JBL, Plaintiffs and/or the decedents suffered severe personal injuries and/or death.

COUNT LXX
JBL INCORPORATED – BREACH OF WARRANTY

649. Plaintiffs repeat and incorporate by reference paragraphs 1 through 271 and 635 through 643 of this Complaint.

650. Defendant JBL Incorporated breached express and implied warranties of merchantability and fitness in the manufacture, sale and distribution of said amplifiers.

651. As a direct and proximate result of said breach, Plaintiffs suffered injuries or death.

ESSEX INSURANCE COMPANY, MULTI-STATE INSPECTIONS, INC. AND HIGH
CALIBER INSPECTIONS, INC.

652. Plaintiffs repeat and incorporate by reference herein paragraphs 1 through 271 of this Complaint.

653. The Essex Insurance Company (hereinafter “Essex”) is a corporation licensed to sell liability and property and casualty insurance in the State of Rhode Island. It issued a policy of commercial liability insurance number 3CH 0430 to Michael Derderian, effective from March 24, 2002 to March 24, 2003 for The Station at 211 Cowesett Ave., West Warwick.

654. Multi-State Inspections, Inc. (hereinafter “Multi-State”) is a corporation organized under the laws of the State of Rhode Island for the business of performing insurance inspections.

655. High Caliber Inspections, Inc. (hereinafter "High Caliber") is a corporation organized under the laws of the State of Rhode Island for the business of performing insurance inspections.

656. At various times, including but not limited to April 4, 1996, March 25, 1998 and October 8, 2002, Essex, through its agents and servants, Multi-State and High Caliber, conducted inspections of the premises at 211 Cowesett Ave. Essex, Multi-State and High Caliber were negligent in performing said inspections. Their negligence included without limitation:

- a. failing to adequately inspect The Station for safety hazards and fire/building code violations;
- b. failing to note the presence of highly flammable surface treatments;
- c. failing to note the inadequacy of exits;
- d. failing to note practices of overcrowding;
- e. allowing the use of dangerous pyrotechnic devices during performances at The Station;
- f. knowing of numerous dangerous conditions and fire hazards at The Station and failing to remedy those conditions or order the insureds to remedy them;
- g. failing to protect members of the public for the foreseeable risk of serious injury or death at The Station;
- h. failing to adequately oversee, supervise, monitor, evaluate, train and/or retrain those performing inspections of The Station; and
- i. other acts and failures to act that may become apparent after discovery.

657. Defendants Essex, Multi-State and High Caliber, in undertaking to perform said inspections, recognized or should have recognized that the competent performance of the inspections was necessary for the protection of third persons, including Plaintiffs.

658. Essex' insured, Michael Derderian, relied upon the results and recommendations of said negligently performed inspections.

659. The negligence of Essex, Multi-State and High Caliber, and each of them, was a proximate cause of Plaintiffs' deaths and injuries.

COUNT LXXI
ESSEX INSURANCE COMPANY – NEGLIGENCE

660. Plaintiffs repeat and incorporate by reference herein paragraphs 1 through 271 and 653 through 659 of this Complaint.

661. This Count seeks, on behalf of all plaintiffs, damages from Essex Insurance Company for its negligence.

COUNT LXXII
MULTI-STATE INSPECTIONS, INC. – NEGLIGENCE

662. Plaintiffs repeat and incorporate by reference herein paragraphs 1 through 271 and 653 through 659 of this Complaint.

663. This Count seeks, on behalf of all plaintiffs, damages from Multi-State Inspections, Inc. for its negligence.

COUNT LXXIII
HIGH CALIBER INSPECTIONS, INC. – NEGLIGENCE

664. Plaintiffs repeat and incorporate by reference herein paragraphs 1 through 271 and 653 through 659 of this Complaint.

665. This Count seeks, on behalf of all plaintiffs, damages from High Caliber Inspections, Inc. for its negligence.

UNDERWRITERS AT LLOYD'S, LONDON AND
GRESHAM & ASSOCIATES OF R.I., INC.

666. Those Underwriters At Lloyd's, London Subscribing To Policy No. 05409 (hereinafter, "Lloyd's") is a surplus lines insurer approved to issue policies in the State of Rhode Island, having a designated agent for service in Rhode Island, and having sufficient minimum contacts with Rhode Island to be subject to this Court's jurisdiction.

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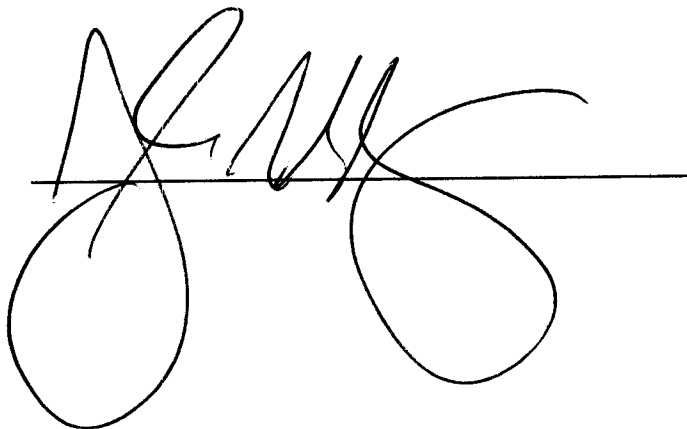
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A large, stylized handwritten signature in black ink, likely belonging to Joseph Krowski, is written over a horizontal line. The signature is fluid and cursive, with large loops and a long horizontal stroke extending to the right.

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND**

C.A. NO.: 04-312L ALBERT A. GRAY, ET AL. V. JEFFREY DERDERIAN, ET AL.
C.A. NO.: 03-148L TAMMY PASSA, ET AL. V. JEFFREY DERDERIAN, ET AL.
C.A. NO.: 03-208L RONALD KINGSLEY, ET AL. V. JEFFREY DERDERIAN, ET AL.
C.A. NO.: 03-483L CHAD HENAULT, ET AL. V. AMERICAN FOAM CORP., ET AL.

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS
MULTISTATE INSPECTIONS, INC. AND HIGH CALIBER
INSPECTIONS, INC.'S MOTION TO DISMISS**

I. FACTS:

On December 20, 2004 the plaintiffs in the above captioned matter filed their First Amended Master Complaint. The plaintiffs in the Passa, et al. vs. Derderian, et al., C.A. no.: 03-148L, Kingsley, et al. vs. Derderian, et al., C.A. No.: 03-208L, and Henault, et al. vs. American Foam Corporation, et al., C.A. No.: 03-483L, cases have adopted the First Amended Master Complaint filed in this action in its entirety. Plaintiffs have alleged that Essex Insurance Company "issued a policy of commercial liability insurance...to Michael Derderian, effective from March 24, 2002 to March 24, 2003 for The Station at 211 Cowesett Avenue, West Warwick." (See Plaintiffs' First Amended Master Complaint, page 134, paragraph 653, attached hereto as Exhibit A¹). The plaintiffs further allege that Essex Insurance Company is a corporation "licensed to sell liability and property and casualty insurance in the State of Rhode Island" and that High Caliber and Multi-State Inspections, Inc. are "corporations organized under the laws of the State of Rhode Island for the business of performing insurance inspections." (See

¹ Defendants have attached only those sections of the Plaintiffs' First Amended Master Complaint that apply to plaintiffs allegations as to High Caliber and Multi-State Inspections, Inc found on pages 134 through 136, paragraphs 652 through 665, Counts LXXII and LXXIII in an attempt to reduce the size of the filing.

Plaintiffs' First Amended Master Complaint, pages 134-135, paragraphs 653, 654, 655, attached hereto as Exhibit A).

The plaintiffs have plead that "[a]t various times, including but not limited to April 4, 1996, March 25, 1998 and October 8, 2002, Essex, through its agents and servants, Multi-State and High Caliber, conducted inspections of the premises at 211 Cowesett Ave. Essex, Multi-State and High Caliber were negligent in performing said inspections." (See Plaintiffs' First Amended Master Complaint, page 135, paragraph 656, attached hereto as Exhibit A). The plaintiffs allege that "[d]efendants Essex, Multi-State and High Caliber, in undertaking to perform said inspections, recognized or should have recognized that the competent performance of the inspections was necessary for the protection of third persons, including Plaintiffs." (See Plaintiffs' First Amended Master Complaint, page 135, paragraph 657, attached hereto as Exhibit A).

II. LAW:

According to Rhode Island General Laws § 27-8-15 entitled "Insurance inspections,":

The furnishing of, or failure to furnish, insurance inspections or advisory services in connection with or incidental to the issuance or renewal of a policy of property, casualty or boiler and machinery insurance shall not subject the insurer, whether domestic or foreign, its agents, employees, or service contractors, to liability for damages from injury, death or loss occurring as a result of any act or omission in the course of those services. This section shall not apply in the event the active negligence of the insurer, its agent, employee, or service contractor, created the condition that was the proximate cause of injury, death or loss.

When a statute is clear and unambiguous the court adopts its plain and ordinary meaning. Pier House Inn, Inc. v. 421 Corp., Inc. 812 A.2d 799, 804 (R.I. 2002). When

interpreting a statute the court should “presume that the Legislature intended every word, sentence, or provision to serve some purpose and have some force and effect, but...[a reviewing court should] not interpret a statute in a manner that would defeat the underlying purpose of the enactment.” Id. Lastly, when a statute is ambiguous the reviewing court should “ground [their] interpretation in policy considerations.” Id.

The Rhode Island Supreme Court has clearly and consistently held that in order for a defendant to be held liable for their “active negligence” they must “actually [be] doing something at the time of the injury.” Mailloux v. Steve Soucy Construction Co., Inc., 116 R.I. 348, 356 A.2d 493, 495 (R.I. 1976). In Perry v. St. Jean, 100 R.I. 622, 218 A.2d 484, 485 (R.I.), the Rhode Island Supreme Court held:

‘[P]assive negligence’ denotes negligence which permits defects, obstacles or pitfalls to exist upon the premises, in other words, negligence which causes dangers arising from the physical condition of the land itself. ‘Active negligence’, on the other hand, is negligence occurring in connection with activities conducted on the premises, as, for example, negligence in the operation of machinery or of moving vehicles whereby a person lawfully upon the premises is injured.

In the case of Hone v. Lakeside Swimming Pool & Supply Company, 114 R.I. 394, 333 A.2d 430, where the defendant excavated a hole for a swimming pool, did not place a guard around the excavation site and the plaintiff’s minor daughter fell into the hole, the Rhode Island Supreme Court held that “the defendant’s nonfeasance with respect to failing to cover or surround with barriers the excavation does not come within the definition of active negligence as set forth in Perry v. St. Jean.” 333 A.2d at 432.

Black’s Law Dictionary, Seventh Edition, defines casualty insurance as:

An agreement to indemnify against any loss resulting from a broad group of causes such as legal liability, theft, accident, property damage and workers' compensation. The meaning of casualty insurance has become blurred because of this rapid increase in different types of insurance coverage.

Black's Law Dictionary refers one to the definition of liability when defining legal liability. The definition of liability is "[t]he quality or state of being legally obligated or accountable; legal responsibility to another or society, enforceable by civil remedy or criminal punishment for injuries caused by negligence." Black's Law Dictionary, Seventh Edition.

III. ARGUMENT:

Rhode Island General Law § 27-8-15 clearly exempts insurers and those who perform inspections for insurers from liability for "damages from injury, death, or loss occurring as a result of any act or omission in the course of those services." The statute only allows for liability against the insurer and their inspectors if the active negligence of the inspector or insurer created the condition that was the proximate cause of the plaintiff's loss. In other words, an affirmative action by the inspector during the inspection must create a condition and that specific condition created by the inspector must cause the plaintiffs' loss.

High Caliber Inspections, Inc. (hereinafter High Caliber) and Multi-State Inspections, Inc. (hereinafter Multi-State) were hired by an insurance company to evaluate the liability risk in insuring 211 Cowesett Avenue, West Warwick, R.I. As made clear by Rhode Island case law, active negligence is negligence that occurs as a result of actually doing something while on the premises at the time of the injury. While on the premises High Caliber and Multi-State inspectors made a visual inspection of the

property. High Caliber and Multi-State never partook in any affirmative actions such as installation, renovation, modification or the like while on the property.

As Multi-State and High Caliber inspectors did nothing while at 211 Cowesett Avenue, West Warwick, R.I. other than conduct inspections, they cannot have engaged in active negligence. If Rhode Island case law refuses to extend the definition of active negligence to a defendant who dug an 8-foot by 8-foot by 4-foot hole and left it unguarded, liability cannot be extended to High Caliber and Multi-State inspectors for walking onto a property and making visual observations for an insurance company. This is not the active negligence that the drafters of R.I.G.L § 27-8-15 require to circumvent the immunity provided to inspectors. In fact, the inspections conducted by Multi-State and High Caliber are the specific activities made immune from liability under R.I.G.L § 27-8-15.

Furthermore, the plaintiffs in paragraph 656 of their First Amended Master Complaint set forth those omissions that they claim creates liability on High Caliber and Multi-State. The plaintiffs generally claim, "Essex, Multi-State and High Caliber were negligent in performing said inspections." The Plaintiffs' First Amended Master Complaint then alleges:

Their negligence included without limitation: a. **failing to adequately inspect** The Station for safety hazards and fire/building code violations; b. **failing to note the presence of** highly flammable surface treatments; c. **failing to note inadequacy of** exits; d. **failing to notice practices of** overcrowding; e. **allowing the use of** dangerous pyrotechnic devices during performances at The Station; f. **knowing of numerous dangerous conditions** and fire hazards at The Station and failing to remedy them; g. **failing to protect** members of the public for the foreseeable risk of serious injury or death at The Station; h. **failing to adequately oversee**, supervise, monitor, evaluate, train

and/or retrain those performing inspections of The Station; i. other acts and failures to act that may become apparent after discovery.

In paragraphs 657 and 658 of their First Amended Master Complaint, plaintiffs allege "Defendants Essex, Multi-State and High Caliber, in undertaking to perform said inspections, recognized or should have recognized that the competent performance of the inspections was necessary for the protection of third persons including Plaintiffs" and that "Essex' insured, Michael Derderian, relied upon the results and recommendations of said negligently performed inspections."

A close reading of the Plaintiffs' First Amended Master Complaint reveals it is devoid of any Count, general or specific, that alleges High Caliber and Multi-State engaged in active negligence in creating a circumstance that proximately caused death or injury to any plaintiff. Actually, Plaintiffs' First Amended Master Complaint against High Caliber and Multi-State is completely based on the inspectors' omissions in inspecting the premises and not on any affirmative act or action of an inspector while on the premises, let alone any active negligence attributable to High Caliber and Multi-State. Multi-State and High Calibers' omissions, as pled by the plaintiffs, at worse falls within the passive negligence definition of Perry v. St. Jean.

If you take the allegations in the First Amended Master Complaint in the light most favorable to the plaintiffs, High Caliber and Multi-State "merely allowed defects, obstacles or pitfalls to exist upon the premises", Perry v. St. Jean, 100 R.I. 622, 218 A.2d 484 (R.I.), which dose not constitute "active negligence." In order to avoid the immunity afforded to Multi-State and High Caliber under R.I.G.L § 27-8-15 the plaintiffs must allege and prove that the active negligence of High Caliber and Multi-State caused

the plaintiffs' injuries. Plaintiffs' First Amended Master Complaint is devoid of any allegation of active negligence conducted by High Caliber and Multi-State.

Moreover, the insurance policy for which the inspections were conducted clearly falls within the broad definition of casualty insurance. Black's Law Dictionary's (Seventh Edition) definition of casualty insurance includes "any loss resulting from a broad group of causes such as legal liability...." This definition then requires one to define legal liability or liability, which is "the state of being legally obligated or accountable; legal responsibility to another or society." The inspections done by High Caliber and Multi-State were clearly for an insurance policy that would have indemnified the owners of 211 Cowesett Avenue, West Warwick, R.I. in the event that they were found legally responsible. Furthermore, in paragraph 653 of Plaintiffs' First Amended Master Complaint they allege that "Essex Insurance Company is a corporation licensed to sell liability and property and casualty insurance in the State of Rhode Island." Property and casualty inspections are specifically named and made immune to liability under R.I.G.L. § 27-8-15. As to liability insurance, it falls squarely within Black's Law Dictionary's definition of casualty insurance.


If R.I.G.L. § 27-8-15 did not apply to the inspections performed by High Caliber and Multi-State, the defendants did not have any authority to personally institute or compel the owners of 211 Cowesett Avenue, West Warwick, R.I. to institute any changes that the plaintiffs now claim makes them liable. In this case, the only recourse for High Caliber and Multi-State in observing the dangerous conditions on the premises was to make recommendations to the insurance carrier regarding the potential liability

hazards. High Caliber and Multi-States' only obligation was to make a report of the findings of the inspection and present it to the insurance carrier. High Caliber and Multi-State owed no obligation or duty to the owners of 211 Cowesett Avenue, West Warwick, R.I. let alone to unforeseeable third party patrons entering the property.

Wherefore, defendants High Caliber Inspection, Inc. and Multi-State Inspection, Inc. request that the Plaintiffs' First Amended Master Complaint and the Complaints in the cases of Passa, et al. vs. Derderian, et al., C.A. no.: 03-148L, Kingsley, et al. vs. Derderian, et al., C.A. No.: 03-208L, and Henault, et al. vs. American Foam Corporation, et al., C.A. No.: 03-483L, which have adopted the First Amended Master Complaint, be dismissed with prejudice for failure to state a claim for which relief can be granted.

Respectfully Submitted,
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I hereby certify that a true copy of the within document was sent by electronic mailing on the 7th day of January, 2005 to:

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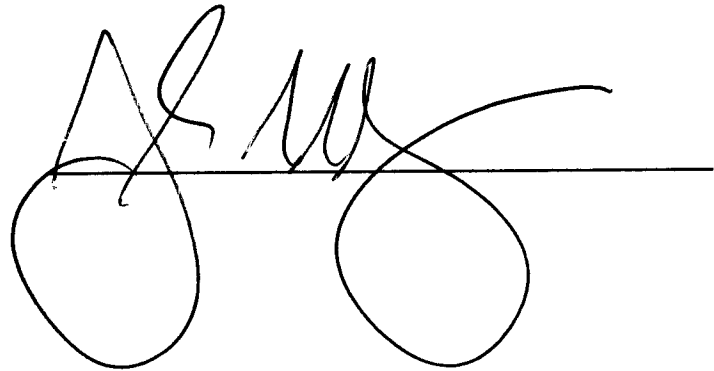
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A handwritten signature in black ink, appearing to read "J. Krowski", is written over a horizontal line. The signature is stylized with large, sweeping loops.